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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 32,504

5 **DELVIN CHARLIE,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **John A. Dean, Jr., District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Jacqueline R. Medina, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 Sergio Viscoli, Assistant Appellate Defender

16 B. Douglas Wood III, Assistant Appellate Defender

17 Santa Fe, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **VANZI, Judge.**

1 {1} This case is before us on remand from our Supreme Court to consider issues
2 raised by Defendant but not decided in our initial opinion. *See State v. Charlie*, 2014
3 WL 7187049, Nos. 34,487 & 34,488, order (N.M. Sup. Ct. Dec. 18, 2014) (non-
4 precedential). We affirm.

5 **BACKGROUND**

6 {2} Because the parties are familiar with the procedural and factual background and
7 because this is a memorandum opinion, we do not provide a detailed summary of this
8 case. We highlight pertinent facts and procedure in connection with the issues
9 analyzed.

10 {3} Defendant raises two issues that were not decided in our previous opinion,
11 arguing that: (1) evidence obtained during the period in which he was removed from
12 the Navajo Nation should be suppressed, and (2) the successive prosecution of
13 Defendant by both the Navajo Nation and the San Juan County Magistrate Court
14 violates his right to equal protection. We take each issue in turn.

15 **DISCUSSION**

16 **Suppression of the Evidence**

17 {4} Defendant contends that any evidence obtained during the period in which he
18 was removed from the Navajo Nation should be suppressed. The crux of Defendant's
19 argument is that, even if Officer Gonzales had authority as a cross-commissioned

1 officer to arrest Defendant, he nevertheless exceeded the scope of that authority when
2 he transported Defendant off the Nation without first following proper extradition
3 procedures. Therefore, he argues, any evidence of Defendant's blood alcohol content
4 that Officer Gonzales obtained after he transported Defendant off the Navajo
5 Reservation is subject to suppression. We disagree.

6 {5} In essence, Defendant's argument is merely an extension of his jurisdiction
7 claim, which our Supreme Court has already addressed. In its dispositional order of
8 reversal, the Court concluded that, because Defendant was never released into the
9 custody of another jurisdiction, extradition was not implicated in this case and,
10 therefore, extradition protocols did not need to be followed. *Id.* ¶ 12. Instead, the
11 Court held that, at the time of Defendant's arrest and transport, Officer Gonzales was
12 properly acting pursuant to his role as an enforcer and investigator of Navajo law. *Id.*
13 ¶ 13. Because there was no need to follow Navajo extradition procedures, Defendant's
14 argument that he was "illegally removed" from the Navajo Nation on that basis must
15 fail. Accordingly, he is not entitled to suppression of the evidence.

16 **Equal Protection**

17 {6} Defendant argues that the successive prosecution of him under New Mexico law
18 after having been previously convicted of the same DWI under Navajo law violated
19 his right to equal protection. We note that Defendant concedes the Navajo Nation and

1 the State of New Mexico are separate sovereigns and that he is not entitled to claim
2 double jeopardy in this case. However, he contends that, because of his status as an
3 Indian, he is uniquely—and unconstitutionally—subject to multiple prosecutions that
4 he would not be otherwise subject to if he was of any other race. We are not persuaded
5 because Defendant waived any right to raise an equal protection claim when he
6 entered into a plea agreement.

7 {7} As an initial matter, Defendant fails to demonstrate how he preserved his
8 constitutional argument in either the San Juan County Magistrate Court or on appeal
9 to the district court. *See* Rule 12-213(A)(4) NMRA (requiring the appellant to include
10 a statement explaining how the issue was preserved below, including citations to the
11 record demonstrating preservation); Rule 12-216(A) NMRA (“To preserve a question
12 for review it must appear that a ruling or decision by the district court was fairly
13 invoked[.]”). Further, not only did Defendant fail to preserve his equal protection
14 argument below, for the first time on appeal he asks this Court to take judicial notice
15 of his Navajo Nation conviction. Defendant has attached a document that is allegedly
16 a copy of Defendant’s Navajo Nation conviction to his brief in chief. It is not a part
17 of the appellate record before this Court, it was never offered or admitted as an exhibit
18 in the courts below, it does not indicate when the alleged drunk driving offense took
19 place, and it is neither certified nor authenticated. Notwithstanding these impediments,

1 however, we need not consider the pleading because we affirm on the basis that
2 Defendant waived any constitutional challenge to his plea conviction.

3 {8} Article VI, Section 2 of the New Mexico Constitution provides that a defendant
4 “shall have an absolute right to one appeal.” “However, a plea of guilty or nolo
5 contendere, when voluntarily made after advice of counsel and with full understanding
6 of the consequences, waives objections to prior defects in the proceedings and also
7 operates as a waiver of statutory and constitutional rights, including the right to
8 appeal.” *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1; *State v.*
9 *Singleton*, 2001-NMCA-054, ¶ 11, 130 N.M. 583, 28 P.3d 1124 (noting that
10 “[f]undamental rights, including constitutional rights, can be waived”). We
11 nevertheless recognize that a defendant can negotiate a conditional plea in which he
12 reserves the right to appeal an issue raised in the pretrial motion. *See* Rule 5-304(A)(2)
13 NMRA.

14 {9} In this case, Defendant entered into a conditional guilty plea and reserved his
15 right to raise only a jurisdictional claim on appeal. Importantly, Defendant agreed that,
16 with the exception of the jurisdictional issue, he would otherwise give up “any and all
17 motions, defenses, objections or requests.” Nothing in the plea agreement indicates
18 that Defendant intended to reserve the right to raise an equal protection claim for
19 appeal nor is there any indication in the record that he invoked a ruling on that issue

1 in either the magistrate or district courts. Accordingly, because he affirmatively
2 waived his right to all defenses except jurisdiction, Defendant's constitutional claim
3 may not be raised for the first time on appeal.

4 {10} To the extent that Defendant argues we should review the merits of his
5 unpreserved equal protection claim under the fundamental error doctrine, we decline
6 to do so. As our Supreme Court has noted, fundamental error or the failure to preserve
7 error is different from waiver which is the "intentional relinquishment or abandonment
8 of a known right." *State v. Chavarria*, 2009-NMSC-020, ¶ 15, 146 N.M. 251, 208
9 P.3d 896 (internal quotation marks and citation omitted). Thus, if a defendant has
10 affirmatively waived the right to appeal, as opposed to failed to preserve the
11 constitutional right at issue, there is no fundamental error. *See id.* Here, Defendant
12 knowingly, intelligently, and voluntarily pled guilty to DWI and reserved his right to
13 appeal jurisdiction only while specifically waiving all other rights and defenses.
14 Because Defendant does not challenge the validity of his guilty plea, we conclude that
15 Defendant waived his right to appeal the constitutionality of his plea conviction.
16 Accordingly, there is no fundamental error necessitating reversal of Defendant's
17 conviction in this case. *See id.* ¶ 16. We therefore do not reach the merits of
18 Defendant's equal protection claim.

19 **CONCLUSION**

1 {11} We affirm Defendant's guilty plea conviction.

2 {12} **IT IS SO ORDERED.**

3

4

LINDA M. VANZI, Judge

5 **WE CONCUR:**

6

7 **JONATHAN B. SUTIN, Judge**

8

9 **J. MILES HANISEE, Judge**